86-813

Supreme Court, U.S.
FILED
NOV 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER, 1986

NO.

HOMEBOUND HEALTH CARE AGENCY,
Petitioner
versus
TENNESSEE VALLEY HOME HEALTH AGENCY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE

COURT OF CIVIL APPEALS

OF THE STATE OF ALABAMA

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Homebound Health Care Agency, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals of Alabama, which Court is the highest State Court in which a decision could be had by virtue of the denial of Homebound's Petition for Writ of Certiorari in the Supreme Court of Alabama, entered on August 22, 1986.

QUESTION PRESENTED

Whether the Court of Civil Appeals of Alabama has construed certain regulations and statutes relating to the operation of a state agency in such a way as to conflict with applicable decisions of the Supreme Court of Alabama, the federal courts of appeal, and this Court, on the federal question of Fourteenth Amendment due process in the administrative setting.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 21, Rules of the Supreme Court of the United States, the following is a list of all parties to the proceeding in the court whose judgment is sought to be reviewed: Homebound Health Care Agency; Certificate of Need Review Board of the State Health Planning Agency, an agency of the State of Alabama; Tennessee Valley Home Health Care Agency; North Alabama Home Health Agency, Inc. and Alacare Home Health Services, Inc.

Pursuant to Rule 28.1, Rules of the Supreme Court of the United States, the following statement is herewith filed for the purpose of naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of the corporation on whose behalf this Petition is filed: Homebound Health Care Agency, Inc., is an Alabama corporation which is owned by Healthcare Plus, Inc., a wholly-owned subsidiary of National Healthcare, Inc., Dothan, Alabama.

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OPINION BELOW

The judgment of the Court of Civil Appeals of Alabama, which is the judgment or decree sought to be reviewed, is printed in Appendix A hereto, *infra*. The order of the Supreme Court of Alabama denying the Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama is printed in Appendix B hereto, *infra*.

JURISDICTION

The Petition for Writ of Certiorari, filed by Homebound Health Care Agency in the Supreme Court of Alabama, was denied without opinion in an order entered on August 22, 1986 (Appendix B, *infra*). By virtue of such order, the Court of Civil Appeals of Alabama became the state court of last resort; i.e., the highest state court in which a decision could be had in this matter. The judgment of that court, entered on the 16th day of April, 1986 is printed in Appendix A hereto, *infra*.

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 and Rule 17.1, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I.

Constitution of the United States, Amendment XIV, Section I:

> * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II.

Section 410-1-7-.01 (22) (b) (1) through (3), *Rules and Regulations*, State Health Planning Agency of the State of Alabama, effective October 18, 1979 [Printed in Appendix C hereto, *infra*].

III.

Section 41-22-13 (a) of the *Code of Alabama, 1975* [Printed in Appendix C hereto, *infra*].

STATEMENT OF THE CASE

On January 6, 1984, an application for a Certificate of Need was filed with the State Health Planning Agency ("SHPA") of Alabama by the Petitioner, Homebound Health Care Agency ("Homebound"). The application sought permission to establish and operate a home health agency in a four-county service area of north Alabama. [Approval of the SHPA is a prerequisite to the establishment and operation of any new home health agency, under and by virtue of the health planning scheme mandated by 42 U.S.C. § 300 m, the Public Health Service Act.]

The application itself, with its supporting documents, stressed the cost-efficient nature of hospital-based home health agencies. It emphasized how other advantages of the proposal, such as centralized training programs, recruitment and information sharing, would translate into lower costs for the elderly home health patients who would utilize the new service.

The application demonstrated the presence of an increasingly aged population and a diminishing population of young people in the proposed service area. An analysis of the relevant demographic and "substantial community need" factors was contained in the application

as well as a detailed financial feasibility study. The application went on to address issues related to the proposal's consistency with the "criteria and standards" of the SHPA Rules and Regulations and the State Health Plan; licensure considerations; professional staff credentials; management capabilities and the sufficiency of manpower to operate the new service.

The Homebound application was timely processed in a normal review cycle of the SHPA and set for public hearing in Montgomery, Alabama, on July 10, 1984. At the public hearing, at which time the favorable, internally-generated, "staff report" of the SHPA was provided to members of the Certificate of Need Review Board, testimony in support of, and in opposition to, the Homebound proposal was taken. Witnesses testifying for Homebound essentially amplified on much of the evidence which was already before the agency by way of the Certificate of Need application itself. Opposing speakers told the Review Board, primarily, that the new service proposed by Homebound was not needed. They stated the home health agencies operating in the area were currently meeting the needs of patients in an adequate fashion, even though an opposing witness admitted there were "unmet needs".

Dr. Derrill Crowe, Chairman of the Certificate of Need Review Board, asked Homebound if it had any case examples supporting the allegation that patients were not being adequately cared for by the existing home health agencies. Ron Sparkman and Warren Calloway, administrators of two of the acute care hospitals through which the home health agency was to operate, stated that there had been no compilation of specific examples of inadequate or inappropriate care by Homebound. However, Mr. Sparkman did speak to what he perceived to be a "lack of competence in the present service that [was] being offered."

Mr. Calloway, responding to a similar question from the Board, stated "there [was] significant room for improvement in the quality of services that [were] being rendered in [his] particular service area and

that's, in particular, the reason that [the group was in Montgomery] with the support of [the] medical staffs to make this application."

Board Chairman Crowe indicated that evidence of actual cases where inpatients had received inferior or inappropriate care would be the proper method for establishing "need" in the proposed service area.

Following the reception and consideration of all the evidence, the Certificate of Need Review Board voted to deny the Homebound Certificate of Need application. The bases assigned by the Board for the adverse decision was that Homebound had not demonstrated "community need" for the service and that the program would result in a "duplication of services" in the area.

Following the adverse decision of the SHPA, and on or about August 7, 1984 (within 30 days from the date of the SHPA decision, as required by SHPA Rules and Regulations), Homebound, through counsel, submitted a letter Request for Reconsideration. Included in the request was Homebound's suggestion or presentation of "good cause" for conducting a reconsideration hearing: ". . . to allow the applicant to present significant and relevant information which was not previously considered by the State Agency and which is being presently compiled by the applicant at the suggestion of the Board." The request went on to state in particular that the "good cause" included new information on *"specific cases in which patients in the proposed service area are not being adequately and properly served by existing home health services or agencies."* (Emphasis added).

In a supplemental filing with the SHPA dated August 9, 1984, counsel for Homebound further stated: "There is new and relevant information which can, and respectfully, should be presented to the Board members, regarding the inadequacy of the existing service which is being currently provided by the home health agencies in the proposed service area. Additionally, there are specific cases, as referred to in our August 7, 1984, letter, in which patients in the proposed service area have not been adequately or appropriately

treated and served by the existing home health services or agencies. We expect the scope of the new and additional information to center around the inadequacies of the existing services, a matter which was not addressed at the July 10 hearing. While the applicant chose to primarily address only the positive aspects of its own application, rather than making comparisons and contrasts to the existing facilities, it is now clear that the Board is interested in such a comparison and the applicant is prepared to move forward and meet such request with evidence and testimony."

Homebound submitted to the SHPA *precisely* what it requested: two detailed letter Requests for Reconsideration presenting evidence of "good cause" for reconsideration. Homebound went further. In the letter of August 9, 1984, counsel stated as follows: "If the Board desires, the applicant will supplement this letter with actual affidavits or summaries of testimony, prior to a decision on this Request for Reconsideration." Homebound was never advised, as the record reflects, that any additional presentation of "good cause" was required. The "good cause" hearing was set for November 13, 1984.

While Homebound had stated to SHPA, and made known to its opponents, the statutory and factual bases for its position that there was "good cause", Homebound went further. On October 30, 1984, Homebound filed a synopsis of its position on "good cause" and appended to the document copies of supporting letters. This filing was in conformity with specific instructions by the state agency, although the information was little more than an amplification of what had been previously filed on August 7 and 9, 1984, and in no way altered or amended the previously stated bases for the Homebound position on the issue of "good cause".

Opposing home health agencies objected to the Homebound filing of October 30, 1984. However, no objection whatever was made to the August 7 and 9, 1984, letter requests submitted by Homebound. While opponents later argued the proposition that the August 7 and 9 letters were not "evidence" (because they did not contain "affidavits, depositions or documents") *there was no such objection at the time the letters were filed, accepted and considered by SHPA.*

On November 13, 1984, a public hearing on the question of "good cause" was conducted. Warren Calloway, a witness for Homebound, testified without objection, essentially reiterating the bases assigned as "good cause" in the letter requests of August 7 and 9. He stated to the Board that the new evidence for consideration (defined as "good cause shown") consisted of, and would center around, significant, relevant information not previously considered by the state agency (i.e., actual case examples of patients in the service area who had received inferior care) and testimony arising out of significant changes in factors or circumstances (i.e., testimony of area physicians who had been earlier unwilling to testify).

At the conclusion of the hearing, a motion was made and seconded in favor of setting the Homebound application for reconsideration, on the basis that sufficient evidence to warrant a rehearing had been presented. The motion passed.

Ultimately, a Reconsideration Hearing was conducted on January 8, 1986. At that time, testimony and evidence was heard and taken by the Board on the areas Homebound had targeted in its original Request for Reconsideration. In addition to testimony by Mr. Calloway, new testimony was available from three area physicians and two social workers, all of whom were knowledgeable about home health agencies in the area. The essence of the new testimony which was offered centered around numerous actual case examples of home health patients who had been unable to obtain proper, adequate or satisfactory home health services from the existing providers. Such information had not been previously considered by the Board at the original hearing in July, 1984. In addition, area physicians had become willing to testify, and did so, adversely to existing home health providers, which was a significant change in circumstances from the original hearing.

At the conclusion of the testimony and evidence, which included opposition testimony from some four witnesses, the Certificate of Need Review Board entertained a motion for approval of the Homebound application. The Board decision was in favor of

Homebound, which decision lead to an appeal to state court by the competing home health agencies.

II. *State Court Review and Decision*

Competitor home health agencies pursued an appeal of the SHPA decision through a Petition for Judicial Review, filed under Alabama's Administrative Procedure Act, § 41-22-1, *et seq., Code of Alabama, 1975*. Along with other bases assigned for the appeal, the competitors alleged the decision of the SHPA was "in violation of Constitutional and/or statutory provisions." Homebound denied such allegation. Homebound contended the decision was in conformity with applicable state and federal statutes and regulations and argued that *"the requirements of due process in the context of administrative proceedings are: 'an opportunity to be heard; to be represented by counsel; to have fair procedures and to know on what evidence an order is based along with the opportunity to confront that evidence.'"* (Emphasis added). Homebound further argued an appellate court should "view the procedural aspects of proceedings before an administrative body with less strictness than when dealing with procedures in a lower court."

The Circuit Court of Montgomery County, Alabama, reversed the SHPA decision. A timely appeal was filed in the Court of Civil Appeals of Alabama. That court affirmed the lower court decision, on the grounds that "Homebound's Request for Reconsideration was in the form of [two] letter[s] which made allegations unsupported by any evidence, whether in the form of affidavits, depositions or documents." Based on this interpretation of the word "evidence", the court ruled that the SHPA had improperly granted Homebound's request for another hearing.

Homebound has argued, and continues to argue, that such a construction of the word "evidence" is a hypertechnical construction which does not comport with established law. Homebound says the decision of the Court of Civil Appeals is in conflict with applicable cases defining due process in the administrative setting.

REASONS FOR GRANTING WRIT

A Writ of Certiorari should issue out of this court to the Court of Civil Appeals of Alabama because the decision rendered below, by that court, exalts form over substance. Moreover, the decision ignores the many well-established guidelines of "fundamental fairness" and due process, particularly as those guidelines are supposed to be applied in reviews of administrative agency actions and decisions.

Homebound made its Request for Reconsideration known to the state agency, and to the opponents, by the filing of two detailed letters from Homebound's counsel to the agency. Those letters, which fairly and adequately apprised everyone of the bases on which reconsideration was being requested, constituted, in Homebound's opinion and in the opinion of SHPA, a "written presentation of evidence of 'good cause shown' ".

Homebound addressed the issue of administrative due process at the first opportunity, in the hearing before the trial court. The legal issue of violation, *vel non*, of Constitutional and/or statutory provisions had actually been raised by the appellants, however, in the pleadings filed in the Circuit Court.

Homebound argued before the trial court and at the court of appeals level that the legal requirements of due process had been amply met by the state agency. Homebound further argued that the construction of the word "evidence" being advanced by the appellants was a construction clearly unintended by the Alabama Administrative Procedure Act and one which, if adopted, would actually result in a *denial of due process as to Homebound.* In support of such argument, Homebound cited the decisional case law of the Alabama Supreme Court, which is essentially to the effect that the requirements of due process in the context of administrative proceedings consist of: "an opportunity to be heard; to be represented by counsel; to have fair procedures and to know on what evidence an order is based along with the opportunity to confront that

evidence." *Katz v. Alabama State Board of Medical Examiners*, 351 So. 2d 890 (Ala. 1977). Further, and as argued to the trial court and later on appeal, where the issue is simply one of law, an administrative agency's failure to comply with certain *procedural* requirements of an administrative procedure act may not rise to the level of "material error" which impairs the fairness of the proceedings or the correctness of the action. *Wahlquist v. School Board of Liberty County*, 423 So. 2d 471 (Fla. App. 1982).

Homebound made the same due process argument to the Court of Civil Appeals as it had first made to the trial court. In fact, Homebound further argued that because the Alabama Administrative Procedure Act provides that it is to be "construed broadly to effectuate its purposes", it is clear the legislature intended the act to be a "safety net" for the minimum elements of fairness which should prevail universally in the administrative process. It was *not* intended to catch unwary bureaucrats or applicants in the snarl of hypertechnical word construction.

The decision of the Alabama appellate court, holding that consideration by SHPA of the letters was improper because the letters were "unsupported by any evidence, whether in the form of affidavits, depositions or documents", is just such a hypertechnical construction of the word "evidence", especially as the term should be applied to administrative agency proceedings. The SHPA actions afforded all parties and intervenors the guarantees of administrative due process; the decision of the Court of Civil Appeals, however, neither comports with such guarantees nor with the well-established case law of the Supreme Court of Alabama, the federal courts of appeal or of this court. For those reasons, and others, the decision of the Court of Civil Appeals of Alabama is due to be reversed.

I. *Due process dictates deference to SHPA's interpretation of its own regulations.*

While it is clear that a judicial tribunal is not unalterably bound by the construction given a statute or regulation by the administrative agency which operates under such statute or regulation [*Railway*

Express Agency, Inc. v. Virginia, 358 U.S. 434, ,79 S. Ct. 411, 3 L.Ed.2d 450 (1959)], it is equally established that great deference is due such interpretation by the reviewing court. *United States v. Larinoff,* 431 U.S. 864, 97 S.Ct. 2150,53 L.Ed.2d 48 (1977); *Grier v. Secretary of the Army,* 799 F.2d 721 (11th Cir. 1986). In fact, it has been held that in order to sustain an agency's interpretation of a statutory (here, regulatory) term, the court need not find the agency's interpretation is the only reasonable one, or even that the court would have reached the same result had the question first arisen in the first instance in judicial proceedings. *Udall v. Tallman,* 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Zenith Radio Corporation v. U.S.,* 437 U.S. 443, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978).

In this case, the SHPA routinely interpreted its own regulation relative to the procedure for requesting a reconsideration. The agency, in the course of doing so, instructed Homebound to file a letter presenting the bases on which the request was made (i.e., a written "presentation of evidence" of "good cause" for a rehearing). The agency did not require that affidavits, depositions or documents (other than the letter or letters of counsel) be filed at that preliminary or threshold level. In keeping with the notion of saving administrative time and money, and for the benefit of the applicant as well, the SHPA clearly found no need for a full-scale "evidentiary hearing" *unless and until the agency first ruled there was good cause to even conduct a rehearing.* Homebound says this was a very logical, common-sense administrative interpretation. The question on appeal is thus whether, in light of the normal aids to statutory construction, the agency's interpretation is "sufficiently reasonable" to be accepted by a reviewing court. *Train v. Natural Resources Defense Council,* 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975). Homebound says that the SHPA's interpretation of the word "evidence" to include unsworn letters from a party's attorney, for the limited purpose of ruling on whether there was "good cause" *for* a rehearing on the merits, is entirely reasonable and proper. A reviewing court should not so interpret an agency's regulations as to thwart the statutory mandate behind the regulations. *Insurance Company of North America v. Gee,* 702 F.2d 411 (2d Cir. 1983).

To the contrary, administrative regulations are to be interpreted broadly and liberally to effectuate their central purposes. *Columbia Gas Development Corporation v. Federal Energy Regulatory Commission*, 651 F.2d 1146 (5th Cir. 1981).

Homebound says that the letters filed on August 7 and 9, 1984, were proper, standing alone. However, the Court of Civil Appeals, relying on its own earlier decision of *Regional Dialysis v. Northeast Alabama Kidney Clinic, Inc.*, 480 So.2d 1226 (Ala. Civ. App.), *cert. denied*, 480 So.2d 1229 (Ala. 1985), found the letters did not meet the requirements of § 41-22-13 (a) of the *Code of Alabama 1975* (*See:* Appendix C, *infra*). Homebound argued below, and again says here, that the "good cause" hearing was a threshold determination by SHPA which under the rules applicable to the Homebound hearing, did not rise to the level of a "contested case" within the meaning of the statute.

Assuming, *arguendo*, that the "good cause" hearing *was* a "contested case", however, there was no objection by the opposing parties to the introduction and consideration of the Homebound letters of August 7 and 9, 1984. It is well established that objections to the introduction of evidence must be raised before the appropriate official or board at the time of the administrative proceedings themselves and *not* for the first time on judicial review. Failure to make timely objections results in a waiver of such objections. *See*, e.g., *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624 (1941); *F.T.C. v. Anderson*, 631 F.2d 741, 203 U.S. App. D.C. 159 (D.C. Cir. 1979); *Bonnaffons v. U.S. Department of Energy*, 492 F.Supp. 1276, aff'd 646 F.2d 548 (D.C.D.C. 1980); *Taft v. Alabama By-Products Corporation*, 733 F.2d 1518 (11th Cir. 1984); *Kahlenberg v. I.N.S.*, 763 F.2d 1346 (11th Cir. 1985). Homebound says any objections which the opponents might have had to the August 7 and 9 letters were, thus, waived. The consideration of such argument, and the resulting decision of the Court of Civil Appeals, was therefore a denial of due process guarantees as to Homebound. Even if the letters were "hearsay", and Homebound says they were not, yet and

still, hearsay can constitute "substantial evidence" in administrative hearings. *School Board of Broward County v. Department of Health, Education and Welfare*, 525 F.2d 900 (5th Cir. 1976). Hearsay evidence admitted without timely objection constitutes substantial evidence to support the administrative decision in the same manner as other evidence. *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980); *Hoska v. U.S. Department of Army*, 677 F.2d 131 (D.C. Cir. 1982).

It has long been the general rule that administrative agencies are not restricted to rigid rules of evidence [*F.T.C. v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948)] and that an administrative agency may even exclude evidence otherwise admissible under federal rules. *See*, e.g., *Carpenter Sprinkler Corporation v. NLRB*, 605 F.2d 60 (2d Cir. 1979); *Donovan v. Sarasota Concrete Company*, 693 F.2d 1061 (11th Cir. 1982). Even if better practice would have been for SHPA to have required affidavits or depositions as the "written presentation of evidence of good cause", an administrative agency's waiver of *procedural* regulations may be consistent with administrative due process so long as there is no prejudice to other parties. *See: American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970); *Amcor v. Brock*, 780 F.2d 897 (11th Cir. 1986).

In this case there was quite obviously no prejudice to the other parties. As Homebound has previously argued below, what possible difference would it have made if Homebound had been required to file two *affidavits* on August 7 and 9 rather than the two *letters* it filed? Would the opposing parties, or the SHPA itself, have recieved one iota more in the way of notice? Clearly, the answer is "no". Homebound says that the obvious intent of the SHPA rule in question is to fairly and adequately apprise the SHPA -- and opposing parties -- of the bases on which an applicant says it is entitled to a rehearing. The intent of the rule is *not* to serve as a treacherous pitfall for those who are clearly attempting to meet its

requirements by following the SHPA's *own* interpretive instructions. If opposing parties had been somehow confused or deceived by the letters of August 7 and 9 -- and affidavits or depositions, or both, would have avoided the deception or the injury -- then there would be a much more legitimate "due process" argument for the opponents to make. As these facts stand, the opponents were given full and timely notice of the *exact* reasons Homebound felt it was entitled to rehearing, and the opponents had more than ample time to file their response. How can such a situation be characterized as anything *less* than administrative due process?

II. *The SHPA action was fundamentally fair and met the requirements of due process as to all parties.*

Due process, in the administrative setting, requires notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. *Mullane v. Central Hanover Bank and Trust Company,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *DIRT, INC. v. Mobile County Commission,* 739 F.2d 1562 (1984). The August 7 and 9 letters from Homebound's counsel gave such notice, and no objections were made at the administrative level. It was only *after* Homebound won its hearing *on the merits* that the opponents creatively assigned objections to the "unsworn and unverified" letters. Those letters, though, were proven totally accurate and truthful at the reconsideration hearing when the evidence and testimony presented to SHPA *was precisely what the letters had said would be presented.*

Homebound has argued, and again asserts here, that due process must be observed in administrative proceedings just as surely as in judicial proceedings. *Morgan v. U.S.,* 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); *Galvan v. Press,* 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911, reh. den. 348 U.S. 852, 75 S.Ct. 17, 99 L.Ed. 671 (1953); *Shaughnessy v. U.S.* , 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953).

Due process does not mean, necessarily, judicial process. All the formalities of judicial proceedings are *not* essential to constitutional due process of law in administrative proceedings, even where the proceedings are quasi-judicial in nature. *Kwong Hai Chew v. Colding,* 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953). Due process -- in administrative settings -- is not a term of fixed and invariable content. It is well-established that there is greater flexibility given to the term when related to administrative, rather than judicial, tribunals. *Cafeteria and Restaurant Workers Union v. McElroy,* 367 U.S. 886,81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

It has been said that due process in a procedure to determine property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights associated, as well as all other circumstances. *Anderson National Bank v. Luckett,* 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944). Homebound respectfully says, as it has previously, that the purpose of the procedure of requiring "written presentation of evidence of good cause" was simply to fairly and adequately apprise all parties of the bases on which rehearing was being requested. It seems amply clear that two detailed letters of counsel would easily do this. Even if the SHPA was incorrect in following the procedure it had followed for several years, a technical failure to comply with the prescribed administrative procedures may be excused where no prejudice results from the good faith error. *Witmer v. U.S.,* 348 U.S. 375, 75 S.Ct. 392, 99 L.Ed. 428 (1955).

Homebound is not suggesting, in this argument, that a complete departure from administrative rules should be sanctioned by this, or any other, court. It is, however, pointing out the common-sense argument that fundamental fairness is what is at stake here. In general, due process of law in its procedural aspects is designed simply to assure adherence to the fundamental principles of justice and fair play. *Hannah v. Larche,* 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307, reh. den. 364 U.S. 855, 81 S.Ct. 33, 5 L.Ed.2d 79 (1959). Essentially, in administrative proceedings of a quasi-judicial character, due process merely means that the parties must be

protected by the observance of the rudimentary requirements of fair play. *F.C.C. v. Pottsville Broadcasting Company,* 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

Homebound suggests to this court, and the record reflects, there was no effort on the part of the administrative agency, or on the part of any of the participants below, to effect a sleight of hand, a ruse or any other fraud upon anyone. Quite to the contrary, everything that was done in the administrative proceedings was open and notorious, and all parties who should have been given notice were given notice. In such a circumstance, a reviewing court should give substantial weight to the good faith judgments and actions of those who administer an agency so long as the procedures domonstrate that they have assured fair consideration of the claims which were presented. *See,* e.g., *In Re Bleaufontaine, Inc.,* 634 F.2d 1383 (5th Cir. 1981).

III. *Conclusion*

No right is more fundamental in the administrative context than the guarantee of the Fourteenth Amendment to due process of law. That right, however, must be enforced in a manner and fashion appropriate to the forum.

It has historically been true that administrative agencies are empowered to interpret the statutes and regulations under which they operate and to make such interpretations known to the interested parties. If parties or persons affected by the interpretation disagree, they can petition the agency for modification of the rule or interpretation or for the adoption of a new rule. At the very least, those adversely affected can -- and indeed, must -- preserve their objections by doing so in a timely fashion at the administrative level. None of this was done by the Homebound opponents. Because of such waiver, consideration of their argument as to the August 7 and 9 letters was improper in the lower court.

Homebound says, though, as it did below, that even if the

opponents *had* properly preserved their objection, reliance on the letters was entirely proper. Under the guidance of Fourteenth Amendment due process principles, how can the Homebound opponents say the determination on "good cause" was not "fundamentally fair"? How can they say they did not have proper "notice"? How can they say they were deprived of the right to "confront the evidence" and present evidence of their own? They connot. Put succinctly, where is the injury to the opponents?

Homebound prays that this Honorable Court will consider correcting the wrong complained of below. The decision of the Court of Civil Appeals is inconsistent with the well-established case law dealing with administrative due process. For the reasons cited, Homebound respectfully requests this court to grant this Petition for Writ of Certiorari in order that the issues may be fully briefed and a decision in favor of the Petitioner reached.

RESPECTFULLY SUBMITTED,

Justice D. Smyth, III

Vaughan H. Robison

Attorneys for Petitioner
P. O. Drawer 1470
Montgomery, Alabama 36102
DATED: November 18, 1986

CERTIFICATE OF SERVICE

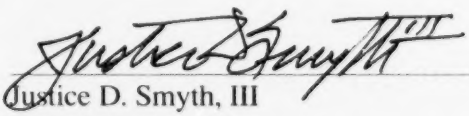
I, Justice D. Smyth, III, a member of the Bar of the Supreme Court of the United States and counsel of record for Homebound Health Care Agency, Petitioner herein, hereby certify that on November 18, 1986, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On the Attorney General of the State of Alabama, Montgomery, Alabama, 36130, by depositing such copies in the United States Post Office, Montgomery, Alabama, to Honorable Peggy Schmitz, Assistant Attorney General for the Certificate of Need Review Board of the State Health Planning Agency, an agency of the State of Alabama, first class postage prepaid and properly addressed to the post office address of the Attorney General, Montgomery, Alabama 36130.

On Charles M. Crook, Esquire, attorney for the private Respondents herein, Montgomery, Alabama 36101, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid and properly addressed to him at the post office address of the law firm of Balch & Bingham, Montgomery, Alabama 36101.

All parties required to be served have been served.

DATED this the 18th day of November, 1986.



Justice D. Smyth, III
P. O. Drawer 1470
Montgomery, Alabama 36102

APPENDIX A

DECISION OF COURT OF CIVIL APPEALS OF ALABAMA

STATE OF ALABAMA --- JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM 1985-86

Civ. 5146

Homebound Health Care Agency
v.
Tennessee Valley Home Health Agency, et al.
Appeal from Montgomery Circuit Court

HOLMES, JUDGE

This is a case arising under the statutes and regulations governing the State Health Planning and Development Agency (SHPDA).

In early 1984, Homebound Health Care Agency (Homebound) filed an application with SHPDA for a certificate of need (CON) for the establishment of a home health agency which would offer services through health care facilities in four north Alabama cities. On July 10, 1984, following a hearing, SHPDA's CON Review Board denied Homebound's CON application.

Subsequently, however, Homebound requested and was granted a reconsideration hearing with respect to the CON. Following the reconsideration hearing, SHPDA, acting through the CON Review Board, granted the CON to Homebound.

Three opponents of the Homebound CON then filed suit in the Circuit Court of Montgomery County, challenging SHPDA's granting of the CON on several grounds.

The circuit court held that SHPDA had failed to follow its own procedures when it granted Homebound's request for a reconsideration hearing, and it entered a judgment reversing the granting of the CON to Homebound.

From this adverse judgement, Homebound appeals. We agree with the holding of the circuit court and affirm.

Pursuant to the Alabama Administrative Procedure Act, Ala. Code (1975), § § 41-22-1 through -27, SHPDA, as most state agencies, has promulgated rules and regulations governing much of its operations. Such rules include those which set forth procedural requirements for requesting a reconsideration hearing of a SHPDA decision.

SHPDA's Rule 410-1-7-.01(22) (b) (1) and (3) provides that any person may, "for good cause shown," request a reconsideration hearing within thirty days following the date of SHPDA's final decision. Rule 410-1-7-.01(22) (b)(2) provides:

> "*Basis for Request.* The basis of requesting a reconsideration hearing shall be restricted to written presentation of evidence of 'good cause shown' which shall be limited to the following:
>
> "(i) Presentation of *significant, relevant information* not previously considered by the State Agency; or
>
> "(ii) Demonstration that there have been *significant changes in factors or circumstances* relied upon by the State Agency in reaching its decision; or
>
> "(iii) Demonstration that the State Agency has materially *failed to follow its adopted procedures* in reaching its decision; or
>
> "(iv) Provides such *other basis* for a public hearing as the State Agency determines constitutes good cause. 'Other basis' may be determined on a case by case basis."

Applying this rule to the present case, as the circuit court did, it is quite apparent that Homebound did not meet the rule's requirement that it make a "written presentation of evidence of 'good cause

shown,' " Rule 410-1-7-.01 (22) (b) (2), within thirty days following the July 10, 1984, denial of the CON. Rule 410-1-7-.01 (22) (b) (3).

The record shows that on August 7, 1984, within the thirty-day time limit for requesting a reconsideration hearing, counsel for Homebound wrote a letter to SHPDA requesting a reconsideration. The letter stated in part:

> "The basis for this request is to allow the applicant to present significant and relevant information which was not previously considered by the State Agency and which is being presently compiled by the applicant at the suggestion of the Board. In particular, the Board stated to the applicant that, in order for its application for a Homebound Healthcare Agency to be approved, the applicant should show to the Board members specific cases in which patients in the proposed service area are not being adequately and properly served by existing home health services or agencies. Based on this, the applicant has been, and continues to be, in the process of compiling such significant and relevant information as has been requested by the Board itself. Therefore, in order to present such information, a reconsideration hearing is required."

Two days later, on August 9, 1984, counsel for Homebound again wrote SHPDA concerning the reconsideration request and gave a more detailed explanation of what evidence Homebound planned to present on reconsideration. The August 9 letter stated, in part:

> "There is new and relevant information which can, and, respectfully, should be presented to the Board members, regarding the inadequacy of the existing service which is being currently provided by the home health agencies in the proposed service area. Additionally, there are specific cases, as referred to in our August 7, 1984, letter in which patients in the proposed service area have not been adequately or appropriately treated and served by the existing home health

services or agencies. We expect the scope of the new and additional information to center around the inadequacies of the existing services, a matter which was not addressed at the July 10 hearing. While the applicant chose to primarily address only the positive aspects of its own application, rather than making comparisons and contrasts to existing facilities, it is now clear that the Board is interested in such a comparison and the applicant is prepared to move forward and meet such request with evidence and testimony."

Though counsel for Homebound provided SHPDA in these letters with a fairly clear explanation of what evidence Homebound planned to present later if a reconsideration hearing were granted, counsel did not provide SHPDA with any such written evidence with the letters to establish a basis for granting the reconsideration, as required by Rule 410-1-7-.01(22)(b)(2). No such evidence was apparently provided to SHPDA until October 1984, after the thirty-day time limit had run for requesting a reconsideration by making a written presentation of evidence of good cause.

In *Regional Dialysis v. Northeast Alabama Kidney Clinic, Inc.*, 480 So 2d 1226 (Ala. Civ. App.) *cert. denied,* 480 So. 2d 1229 (Ala. 1985), this court was presented with a situation quite similar to that now before us. In that case a CON was granted to Northeast Alabama Kidney Clinic for a dialysis facility. Regional Dialysis filed a motion for a reconsideration of the approval of the CON. SHPDA's CON Review Board granted the reconsideration, as it did in the present case, and on reconsideration reversed its decision and denied Northeast's CON.

Affirming the circuit court in *Regional Dialysis,* this court held that SHPDA had erroneously granted the reconsideration hearing requested by Regional Dialysis. Regional's request had been in the form of a letter, which alleged that SHPDA had failed to follow its procedures and cited certain SHPDA statutes and rules relating to substantive review criteria, rather than procedure.

This court, speaking through our Presiding Judge Wright, found that Regional's letter did not contain any evidence, such as affidavits, depositions, or documents, which supported its allegations. As such, we held that "Regional did not show 'good cause' for its reconsideration request," as required by Rule 410-1-7-.01 (22) (b) (2) and that SHPDA had improperly granted the reconsideration request. *Regional Dialysis,* 480 So. 2d at 1228.

The *Regional Dialysis* case requires our affirmance in the instant case. As in *Regional Dialysis,* Homebound's request for a reconsideration was in the form of a letter which made allegations unsupported by any evidence, whether in the form of affidavits, depositions, or documents. Such evidence is required by Rule 410-1-7-.01 (22) (b) (2), and SHPDA violated this rule when it granted Homebound's request for reconsideration.

This case is due to be, and it is, affirmed.
AFFIRMED.
Wright, P. J., and Bradley, J., concur.

APPENDIX B
ORDER OF THE SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 22, 1986

85-1024

EX PARTE: HOMEBOUND HEALTH CARE AGENCY

PETITION FOR WRIT OF CERTIORARI

(Re: Homebound Health Care Agency v. Tennessee Valley Home Health Agency, et al.)

CIV 5146

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

HOUSTON, J. - TORBERT, CJ., MADDOX, ALMON & BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the Instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 22 day of Aug. 1986 .

Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX C

STATE STATUTES AND REGULATIONS

Section 41-22-13 (a) of the *Code of Alabama 1975:*

In contested cases, the rules of evidence as applied in nonjury civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Whenever any evidence is excluded as inadmissible, all such evidence existing in written form shall remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof by means of a brief statement on the record describing the testimony excluded. All rulings on the admissibility of evidence shall be final and shall appear in the record. Subject to these requirements, when a hearing will be expedited and the interest of the parties will not be prejudiced substantially, any part of the evidence may be received or may be required to be submitted in verified form; provided, the adversary party shall not be denied the right of cross-examination of the witness. The testimony of parties and witnesses shall be made under oath.

Section 410-1-7-.01 (22) (b) (1) through (3), *Rules and Regulations*, State Health Planning Agency of the State of Alabama, eff. October 18, 1979:

(b) *Reconsideration Hearing*

1. *Who May Request Reconsideration Hearing.* Any person may, for good cause shown, request in writing a public hearing for the purpose of reconsidering a decision of the State Agency.

2. *Basis for Request.* The basis of requesting a reconsideration hearing shall be restricted to written presentation of evidence of "good cause shown" which shall be limited to the following:

(i) Presentation of *significant, relevant information* not previously considered by the State Agency; or

(ii) Demonstration that there have been *significant changes in factors or circumstances* relied upon by the State Agency in reaching its decision; or

(iii) Demonstration that the State Agency has materially *failed to follow its adopted procedures* in reaching its decision; or

(iv) Provides such *other basis* for a public hearing as the State Agency determines constitutes good cause. "Other basis" may be determined on a case by case basis.

3. *Time Limit for Requesting Reconsideration Hearing.* Written request, including presentation of "good cause shown" must be made within thirty (30) days following the date of the final decision of the State Agency.